Case Comments

FCC v. Pacifica Foundation: An Indecent (Speech) Decision? (George Carlin's "Filthy Words")

The United States Supreme Court in *FCC v. Pacifica Foundation*[1] held that the Federal Communications Commission (FCC or Commission) had the power to regulate an indecent but not obscene radio broadcast. The Court thus announced a new category of restricted speech under the first amendment. In its very narrow holding, the Court concluded that FCC regulation of a George Carlin monologue containing indecent language, "patently offensive words dealing with sex and excretion,"[2] was not constitutionally infirm. The rationale of the Court's opinion, however, is ambiguous both with respect to the constitutional propriety and the permissible scope of such regulation. This Case Comment will examine the Court's opinion and will demonstrate that: (1) the ambiguity of the Court's opinion regarding the constitutional propriety of regulation under the facts of *Pacifica* can be explained by the failure of such regulation to comport with traditional first amendment notions of content-based regulation; and (2) the failure of the Court to establish principled limits on the regulatory power of the FCC will lead to significant chilling effects on protected speech.

I. Facts and Holding

A. *Facts*

On October 30, 1973 at approximately 2:00 p.m., station WBAI-FM, New York, New York, licensed to Pacifica Foundation, aired a prerecorded twelve-minute comedy routine entitled "Filthy Words" taken from a live album by George Carlin. The routine was aired during the broadcast of a live program dealing with "contemporary society's attitude toward language."[3] Listeners were invited to call in and discuss this topic with the program host. The Carlin monologue was broadcast near the end of the program because the station "regarded [it] as an incisive satirical view of the subject under discussion."[4] Immediately prior to the broadcast of this material the station informed listeners of its "sensitive content" and advised them that anyone who might find the broadcast offensive should turn the program off for fifteen minutes. The routine parodied what Carlin

1. 98 S. Ct. 3026 (1978).
2. *Id.* at 3038.
3. *Id.* at 3030.
4. FCC v. Pacifica Foundation, 56 F.C.C.2d 94, 95 (1975), *clarified*, 59 F.C.C.2d 892 (1976), *rev'd*, 556 F.2d 9 (1977), *rev'd*, 98 S. Ct. 3026 (1978).

described as the words one cannot say over the public airwaves.[5] Carlin repeated these words over and over again, illustrating and satirizing the various societal contexts in which they were used, in an attempt to illustrate his theory that societal attitudes towards these words are "essentially silly."[6] After the broadcast the FCC received a complaint from a man in New York City claiming to have heard the program while driving in his car with his son.[7] Thereafter, the FCC commenced this action against Pacifica Foundation in an attempt to clarify the standards for regulating indecent language.

The following standards were established. The Commission defined indecency as "patently offensive" language "as measured by contemporary community standards for the broadcast medium" that describes "sexual or excretory activities and organs."[8] Primary concern was voiced over the airing of indecent language "at times of the day when there is a reasonable risk that children may be in the audience . . . ."[9] Obscene language was distinguished by noting that indecent language "(1) . . . lacks the element of appeal to the prurient interest . . . and that (2) when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value."[10] In the first FCC order it was unclear whether indecent speech would be completely banned from radio:

> When the number of children in the audience is reduced to a minimum, for example during the late evening hours, a different standard might conceivably be used. The definition of indecent would remain the same . . . However, we would also consider whether the material has serious literary, artistic, political or scientific value, as the licensee claims. . . .[11]

Two of the commissioners voiced a clear opinion that indecent language should be prohibited from the airwaves at all times, one commissioner commenting that "garbage is garbage."[12] The Commission also sought to support its standard by pointing to the privacy interest of unwilling adult listeners in their homes.

Initial reaction to the standard developed in this case forced the FCC to issue a clarifying statement. In a subsequent memorandum the FCC emphasized its earlier position that its treatment of indecent speech was based on a nuisance analogy and maintained that it never intended an absolute ban of this type of language but only sought to channel this language to times of the day when children would not be in the audience. The Commission further noted that it did not intend to hold broadcasters

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5. *Id.* at 95. The list included shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.
6. *Id.* at 96.
7. The son was 15 years old at the time. BROADCASTING, July 10, 1978, at 20.
8. 56 F.C.C.2d at 98.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 102-03.

liable if such language was broadcast in connection with live coverage of public events because "it did not intend to 'stifle robust, free debate on any of the controversial issues confronting our society.' "[13]

The FCC declined to impose any of the statutory sanctions[14] within its power because the Commission's purpose in bringing this action against Pacifica was to clarify the indecency standard. Rather, the Commission chose to associate the letter of complaint with the station's license file for consideration only upon receipt of any subsequent complaints about the station's programming.

The Court of Appeals reversed, with each of the three judges filing separate opinions. Judge Tamm, writing for the court, initially concluded that the FCC's action was prohibited by section 326 of title 47 of the United States Code which prohibits censorship by the FCC.[15] Judge Tamm also held that the indecency standard established by the FCC was both overbroad and vague.[16] In a concurring opinion, Judge Bazelon considered the constitutional propriety of indecent speech regulation and concluded that the FCC's definition of indecent speech was "massively over-broad."[17] Judge Bazelon found no substantial invasion of the privacy interest of nonconsenting adults[18] and found that the presence of children in the radio audience did not necessitate broad regulation.[19] Judge Leventhal in dissent stressed both the narrowness of the Commission's holding and the "compelling state interest" in protecting children.[20]

B. *Statutory Holdings*

The Supreme Court initially considered two statutory issues.[21] The first concerned whether the Commission's action violated the Federal

13. 59 F.C.C.2d 892, 892, *rev'd*, 556 F.2d 9 (1977), *rev'd*, 98 S. Ct. 3026 (1978).

14. *See* note 21 *infra*.

15. 556 F.2d 9, 14 (1977), *rev'd*, 98 S. Ct. 3026 (1978).

16. *Id.* at 16.

17. *Id.* at 22.

18. *Id.* at 26-27.

19. *Id.* at 28-29.

20. *Id.* at 37.

21. The powers of the FCC in this area are grounded on both specific and general statutory grants. The statutes creating specific powers in the FCC to deal with indecent speech are as follows.

18 U.S.C. § 1464 (1976) provides,

> whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both . . . .

Section 1464 does not by itself provide a statutory basis for FCC sanctions. Any prosecution instituted under § 1464 would originate in the Justice Department. The following statutes, however, incorporate § 1464 for the purpose of providing the FCC with specific administrative powers.

47 U.S.C. § 312 (1970) provides,

> (a) The Commission may revoke any station license or construction permit—
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> . . . .
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> (6) for violation of section 1304, 1343, or 1464 of Title 18.
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> (b) Where any person . . . (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of Title 18, . . . the Commission may order

anticensorship statute.[22] Relying on the fact that both the anticensorship provision and section 1464, the provision prohibiting the use of "obscene, indecent, or profane" language on radio, were enacted as part of the same section in the Radio Act of 1927, the Court concluded that Congress intended to give meaning to both provisions.[23] The Court construed the anticensorship provision as limiting only prior restraints on programming.[24] The statute was held inapplicable to the evaluation of past programming practices for license renewal purposes. This issue was not a subject of debate among the Justices.

The second and critical statutory issue concerned the proper construction of the term "indecent" under section 1464.[25] This issue served as a focal point for a dispute between the majority and a four-member dissent led by Justice Stewart. Justice Stevens, writing for the majority, maintained that the "plain language" of the statute contemplated regulation of more than the obscene. First, he noted that "the words 'obscene, indecent, or profane' [were] written in the disjunctive, implying that each [had] a separate meaning."[26] Second, Justice Stevens indicated that the Commission's interpretation of section 1464 had for a "long" time encompassed more than the obscene.[27] Finally, the Court concluded that

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such person to cease and desist from such action.

47 U.S.C. § 503 (1970) provides,

(b) (1) Any licensee or permittee of a broadcast station who—

. . . .

(E) violates section 1304, 1343, or 1464 of Title 18, shall forfeit to the United States a sum not to exceed $1,000. Each day during which such violation occurs shall constitute a separate offense. Such forfeiture shall be in addition to any other penalties provided by this chapter.

The Commission's specific powers are significantly enhanced by 47 U.S.C. 303 (1970) which provides,

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

. . . .

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest . . . .

This provision has traditionally given the FCC very broad regulatory power over the radio industry. *See* National Broadcasting Co. v. United States, 319 U.S. 190 (1943); Kalven, *Broadcasting, Public Policy and the First Amendment,* 10 J. LAW & ECON. 15 (1967); Robinson, *The F.C.C. and the First Amendment: Observations on 40 Years of Radio and Television Regulation,* 52 MINN. L. REV. 67 (1967). The powers of the FCC over the broadcast industry, although broad, are not without limitation. 47 U.S.C. § 326 (1970) provides,

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications of signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

22. 47 U.S.C. § 326 (1970); *see* note 21 *supra.*

23. 98 S. Ct. at 3033.

24. *Id.*

25. 18 U.S.C. § 1464 (1976); *see* note 21 *supra.*

26. 98 S. Ct. at 3035.

27. *Id.* at 3036; The accuracy of this conclusion is particularly suspect since prior to 1970 there was no attempt by the FCC to distinguish between the indecent and the obscene. *See* Eastern Educ. Radio, 24 F.C.C.2d 408, 412 (1970). After *Eastern* the distinction between indecent and obscene was blurred in Sonderling Corp., 27 P. & F. RADIO REG. 2D 285, *reconsideration denied,* 41 F.C.C.2d 777 (1973), *aff'd sub nom.* Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975). The primary reason for the FCC action against Pacifica Foundation was the desire of the Commission to clear up the ambiguities in this area. *See* text accompanying note 14 *supra.*

Congress did not intend to impose the same limitations on indecent speech in broadcast as in other contexts, relying on the familiar proposition that "the first amendment has special meaning in the broadcast context."[28]

The dissent construed the term "indecent" as having the same meaning as the term "obscene" developed in *Miller v. California.*[29] In support of this construction Justice Stewart pointed to the other statutes found in the same chapter of the United States Code entitled "obscenity."[30] He noted that on each occasion that those statutes had previously been considered, the Court had construed "indecent" to mean "obscene."[31] Although the statutes in this chapter had been enacted separately, they were codified together in the Criminal Code of 1948.[32] Due to the close relation of the statutes, Justice Stewart indicated that the word "indecent" should be interpreted consistently throughout the chapter. Moreover, the principle that the Court must, if possible, construe a statute to avoid consideration of its constitutionality was also stressed.[33] Since the FCC readily conceded that the Carlin monologue was not "obscene" under the *Miller* test, the dissent maintained that the statute was inapplicable to the speech in question. Thus, the dissent would not have reached the fundamental issue of the constitutional propriety of regulating indecent speech.

The inclusion of this brief recitation of the statutory issues addressed in *Pacifica* serves to illustrate a crucial point. The Court was anxious to impose some degree of regulation upon the broadcasting of indecent speech. Had the Court adopted the dissent's approach, no regulation of indecent speech would have been permissible under the current statutory scheme, notwithstanding the Commission's broad regulatory powers under the "public interest" statute.[34] The Court's statutory interpretation thus cleared the way for a consideration of the constitutional issues.

C. *Constitutional Holdings*

Pacifica lodged two constitutional attacks against the Commission's order. It contended first that the Commission's construction of the statutory language was overly broad and thus impermissibly affected both protected and unprotected speech. Pacifica's second and crucial argument was aimed at the general constitutional propriety of regulating indecent speech.

Responding to Pacifica's first contention, a majority of the Court

28. 98 S. Ct. at 3036 n.17. *See* text accompanying notes 86-90 & 153-58 *infra.*

29. 413 U.S. 15 (1973). *See* text accompanying notes 76-81 *infra.*

30. 18 U.S.C. §§ 1461-1465 (1976); The title of § 1464, the indecency statute under consideration, is "Broadcasting obscene language." 18 U.S.C. § 1464 (1976).

31. FCC v. Pacifica Foundation, 98 S. Ct. 3026, 3056 (1978) (Stewart, J., dissenting).

32. *Id.*

33. *Id.* at 3055 n.2.

34. "[T]he general language of [47 U.S.C. § 303(g), the public interest statute] cannot be used to circumvent the terms of a specific statutory mandate such as that of § 1464." *Id.* at 3055 n.3 (citations omitted).

concluded that the overbreadth challenge was meritless. The majority maintained that the FCC order should be read narrowly as an ad hoc determination "issued in a specific factual context"[35] and that the Commission had not "engaged in formal rulemaking or the promulgation of regulations."[36] The width and breadth of the FCC definition of indecency were therefore not evaluated. In the plurality portion of his opinion, Justice Stevens noted that although the Commission's order might lead to self-censorship by some broadcasters, no serious constitutional problem was implicated because such censorship would affect only the "form rather than [the] content, of serious communication."[37] Justice Powell, in a separate opinion, disagreed with the form-content distinction of Justice Stevens. He agreed, however, that the FCC order should be read as an ad hoc determination and preferred to fortify his position with the expectation that the FCC would proceed cautiously in the future.[38]

The members of the majority were again split over the consideration of the constitutional propriety of the regulation of indecent speech "as broadcast." Justice Stevens, again writing for himself, Chief Justice Burger, and Justice Rehnquist, asserted that the regulation of indecent speech, based on the Court's determination of the *value* of its content, was constitutionally permissible. This notion was grounded on the premise that the regulation of indecent speech is unrelated to the regulation of the expression of ideas, the latter being clearly beyond the power of government.[39] Again relying on this form-content distinction, Justice Stevens found that the "social interest in order and morality"[40] outweighed the slight intrinsic value of such speech. Justice Powell, writing for himself and Justice Blackmun, in a concurring opinion, bolted from this proposition. He maintained that it was the right of the individual to determine the value of any particular mode of expression and that any attempt by the Court to establish a hierarchy of various types of speech for the purpose of granting more or less first amendment protection was inappropriate.[41]

The plurality section of Justice Stevens' opinion also stressed the context in which the speech was used. While the assumption that "filthy words" would be protected in other contexts was accepted *arguendo*, Justice Stevens reasoned that in the broadcast context, regulation of the Carlin monologue was justified.[42] Justice Powell agreed with this latter

35. 98 S. Ct. at 3037.
36. *Id.* at 3032.
37. *Id.* at 3037 n.18.
38. *Id.* at 3047.
39. *See* cases cited at note 135 *infra.*
40. *Id.* at 3039 (quoting Chaplinsky v. New Hampshire 315 U.S. 568, 572 (1942)).
41. *Id.* at 3046.
42. *Id.* at 3039-40.

proposition, emphasizing the overriding societal interests implicated by the broadcast context as opposed to the "value" distinction drawn by Justice Stevens.[43]

Justice Stevens, now writing for a majority of the Court, articulated two overriding justifications for governmental regulation of the Carlin monologue as indecent speech. The first hinged on what the Court described as the "uniquely pervasive presence in the lives of all Americans" of the broadcast media.[44] The Court sought to protect unsuspecting listeners from tuning in programs containing indecent speech. Here the Court emphasized the extent to which radio programs enter the privacy of the home. The Court asserted even more forcefully the societal interest in protecting children from such "uniquely accessible" material.[45]

Justice Brennan, in a fiery dissent, argued that regulation of speech based on an analysis of the social value of that speech was "completely antithetical to basic First Amendment values."[46] He also found the interest of the privacy of adult listeners and the interests of children insufficient to justify the challenged regulation.[47]

Finally the Court emphasized the "narrowness" of its holding:

> This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant.[48]

II. THE CONSTITUTIONAL BACKGROUND

A. *Regulation Based on Value and Harm*

Whether the content oriented regulation of indecent speech is grounded on the Court's judgment regarding the value of that content (Justice Stevens' view), or on the weight of overriding societal interests (Justice Powell's view), such regulation must be carefully considered in light of the fundamental teachings of the first amendment. The basic tenet of the first amendment is that freedom of speech is a fundamental right and should be free from governmental interference unless such speech threatens substantial societal interests or other serious harm.[49] The state is

43. *Id.* at 3047.
44. *Id.* at 3040.
45. *Id.*
46. *Id.* at 3047.
47. *Id.* at 3048.
48. *Id.* at 3041.
49. Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

severely limited in its ability to restrict speech because the free trade of ideas essential to discovering truth flows naturally from speech itself and is paramount to the theory of our Constitution.[50]

Admittedly not all speech is subject to full first amendment protection: fighting words, commercial speech, and obscenity are notable exceptions. Any consideration of the degree of protection afforded a particular mode of expression must recognize both the potential harm of such speech and its value, as measured by its relation to the dissemination of ideas. The relationship between value and harm can be described in the following way. When the state can show that a particular regulation will have little or no effect on the free trade of ideas, the threshold of harm necessary to justify such regulation will be comparatively low because the first amendment seeks to protect the communication of ideas rather than the mere expression of words.[51] When a disjuncture between ideas and words cannot be proved, the state must show some *serious* social detriment or the overriding considerations of some other *substantial* societal interest to justify a particular regulation.[52] A brief examination of fighting words, commercial speech, obscenity, and indecent speech—outside the broadcast context—will illustrate the operation of these elements.

1. *Fighting Words*

In *Chaplinsky v. New Hampshire* the Court upheld a conviction for the use of "fighting words."[53] The Court's definition of fighting words relied on "what men of common intelligence would understand would be words likely to rouse an average addressee to fight."[54] Included in the Court's examples were "threatening, profane or obscene revilings."[55] It may be noted that some of the words used in the Carlin monologue might fall within the category of words contemplated by the *Chaplinsky* Court. Nevertheless, the crucial distinguishing feature of the Carlin monologue is the *context* of that speech. In *Chaplinsky* the Court sought to avoid violence and breaches of the peace provoked by insulting language—substantial societal harms. The value of such speech was also considered by the Court. At least with regard to the face to face confrontation in *Chaplinsky*, such fighting words were "no essential part of any exposition of ideas."[56] The judicial gloss placed on the fighting words doctrine since *Chaplinsky* must be noted in order to fully appreciate the characterization of fighting words as having no social value. Under modern interpretation,

50. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

51. There is considerable debate, particularly in the area of obscenity, whether social ideas can be separated from words or images. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (Brennan, J., dissenting); Roth v. United States, 354 U.S. 476, (1957) (Douglas, J., dissenting).

52. *See generally* cases cited at notes 49-50 *supra.*

53. 315 U.S. 568 (1942).

54. *Id.* at 573.

55. *Id.*

56. *Id.* at 572.

fighting words are not identifiable as a particular category of words; rather, they are those words "[having] a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."[57] A distinction may be drawn therefore between personal insult, which has little social value but threatens substantial harm, and social thought.

2. *Commercial Speech*

First amendment protection of commercial speech has only recently been recognized.[58] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* the Court acknowledged that commercial speech implicated the "free flow of information"[59] and was therefore socially valuable. Protection of the public from false, deceptive, or misleading advertising[60] was asserted as the basis for the legitimate regulation of commercial speech. The prevention of economic harm, then, was the substantial societal interest implicated by the regulation of commercial speech. In addition, the Court noted what it termed the "commonsense differences" between commercial speech and other modes of expression.[61] The Court suggested that these differences formed a basis for according commercial speech a lesser degree of protection. The notions encompassing the "commonsense differences" are that (1) the potential harm of commercial speech can be more easily recognized and more accurately regulated than potential harm resulting from other modes of expression, and (2) there is less danger of suppressing the valuable free flow of information through the regulation of commercial speech because of a strong economic incentive that encourages advertising regardless of regulation.[62]

The constitutional protection afforded commercial speech has recently undergone further refinement. In *Bates v. State Bar of Arizona*,[63] the Court extended the rationale of *Virginia Pharmacy Board*, used to approve the advertising of standardized products, to the advertising of professional legal services.[64] In *Ohralik v. Ohio State Bar Association*,[65] a case concerning in-person solicitation of clients by an attorney, the Court appeared to shift its emphasis in commercial speech analysis. In *Ohralik* the Court began its analysis with the general proposition that commercial speech has "a subordinate position in the scale of First Amendment values," citing the "commonsense differences" developed in *Virginia*

57. Gooding v. Wilson, 405 U.S. 518, 524 (1972); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 618 (1978).

58. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

59. *Id.* at 765.

60. *Id.* at 771.

61. *Id.* at 771-72 n.24.

62. *Id.*

63. 433 U.S. 350 (1977).

64. *Id.* at 390-91 (Powell, J., concurring in part and dissenting in part).

65. 436 U.S. 447 (1978).

Pharmacy Board as evidence of this proposition.[66] While the Court in *Virginia Pharmacy Board* did suggest that commercial speech had diminished value, this characterization appeared as a latent assertion. Indeed this characterization of commercial speech is inconsistent with the major thrust of both *Virginia Pharmacy Board* and *Bates*, that the free flow of truthful information is of substantial social value.[67] Both *Virginia Pharmacy Board* and *Bates* indicated that commercial speech may be more strictly regulated than other forms of speech because potential harm can be more easily recognized and more accurately regulated, and because the dangers of suppressing the free flow of truthful information are diminished in the commercial speech context. These "commonsense differences" appear to be more closely related to the harm rather than the value of commercial speech.

While the Court suggested in a footnote in *Virginia Pharmacy Board*[68] that commercial speech had diminished value, the Court's analysis in both *Virginia Pharmacy Board* and *Bates* demonstrated the substantial social value of commercial speech. To restate the point, *Virginia Pharmacy Board* and *Bates* recognized the "commonsense differences" that may legitimately justify a stricter basis for regulating commercial speech. Such "commonsense differences" did not, however, appear to substantiate the conclusion that commercial speech was less *valuable* than other forms of speech.

What appeared as a latent and perhaps unintended assertion in *Virginia Pharmacy Board* became a prominent feature of the Court's opinion in *Ohralik*. The *Ohralik* Court began its analysis with the assertion that commercial speech is less valuable than other forms of speech and then examined the harm of the particular speech. This apparent shift in emphasis in the area of commercial speech was not explained by the Court.[69] Moreover, the consequences of this decrease in value of

66. *Id.* at 455-56.

67. The Court demonstrated its high regard for commercial speech in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976), noting that "even if the First Amendment were thought to be primarily an instrument to enlighten public decision making in a democracy, we could not say that the free flow of information does not serve that goal." Similarly, in Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977), the Court urged: "The listener's interest [in commercial speech] is substantial: The consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue."

68. 425 U.S. at 771 n.24.

69. It might be argued that the Court in *Ohralik* did not regard commercial speech as possessing diminished social value but merely acknowledged the "commonsense differences" between commercial speech and other forms. Justice Powell, the author of the Court's opinion in *Ohralik*, dispelled this notion in *Pacifica* when he argued:

> I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most "valuable" and hence deserving of the most protection and which is less "valuable" and hence deserving of less protection. . . .
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> . . . .
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> The Court has, however, created a limited exception to this rule in order to bring commercial speech within the protection of the First Amendment.

98 S. Ct. at 3046 & n.3.

commercial speech were not made apparent by the Court's decision. In *Ohralik* the state's interests in preventing in-person solicitation of clients by an attorney were "particularly strong."[70] The "substantive evils" flowing from such solicitations were listed by the Court: "stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation and misrepresentation."[71] Therefore, the regulation of commercial speech at issue in *Ohralik* might have been viewed solely as a reaction to the serious harm that in-person solicitation can inflict upon the community and the legal profession, rather than a reflection on the intrinsic value of commercial speech but for the "diminished value" characterization adopted by the Court.[72]

In re Primus, a companion case, serves as an interesting counterpoint to *Ohralik*. Primus, an attorney representing the American Civil Liberties Union (ACLU) had solicited a potential client *by letter* urging her to allow ACLU to file suit in her behalf.[74] In *Primus*, however, the Court regarded the attorney's action as "political expression and association"[75] and therefore held it to be protected by the first and fourteenth amendments. *Primus* thus highlights the ambiguity of the Court's assertion in *Ohralik* that commercial speech is of lesser value.

3. *Obscenity*

The Supreme Court's theory of obscenity bears a close relationship to the considerations found in *Pacifica* in the sense that both concern language regarded as "patently offensive"[76] and therefore present similar analytical problems. Obscenity is not protected by the first amendment because characteristically it has little or no social value. Under the test of *Miller v. California*[77] obscenity is identified by determining

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appears to the prurient interest . . . ;
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> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and

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70. 436 U.S. 447, 460 (1978).

71. *Id.* at 461.

72. The concept of the "sliding scale" of first amendment values has its origin in Young v. American Mini Theatres, 427 U.S. 50, (1976). In *Young* a plurality of the Court held that erotic materials were entitled to lesser first amendment protection because of the lesser value of such materials. *Id.* at 70-71. *Ohralik* is the first majority decision that clearly adopts this approach to the first amendment, albeit in the context of commercial speech. The drawbacks of this sliding scale approach are considered in the text accompanying notes 123-52 *infra.*

73. 436 U.S. 412 (1978).

74. *Id.* at 416 n.6.

75. *Id.* at 431.

76. FCC v. Pacifica Foundation, 98 S. Ct. at 3038-39.

77. 413 U.S. 15 (1973).

> (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[78]

Since the three elements of the *Miller* test are written in the conjunctive, when a work taken as a whole appeals to the prurient interest but at the same time implicates serious social thought, that material is protected and is not obscene.[79] Therefore, in obscenity adjudication a distinction is drawn between speech that induces psychological excitement resulting from sexual imagery and speech that communicates social ideas.[80] The threshold of harm that justifies regulation of obscenity is minimal because obscene material lacks serious social value. Indeed, the precise nature of the harm inflicted by obscene material has been a matter of continuing debate.[81]

4. *Indecent Speech*

The value of indecent speech has been demonstrated by the closeness of such speech to the communication of ideas. *Cohen v. California*[82] is the seminal case in this area. Cohen had been arrested for wearing a jacket, with the words "fuck the draft" inscribed on the back, in the corridor of the Los Angeles County Courthouse. Justice Harlan, writing for the majority, described the relation of such words to the communication of ideas:

> Much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive, as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.[83]

Justice Harlan concluded that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."[84] The Supreme Court's position in *Cohen*, that such words are constitutionally protected, has been firmly established on numerous occasions and in a variety of contexts.[85]

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78. *Id.* at 24 (citations omitted). Prurience was defined by the Court in Roth v. United States, 354 U.S. 476, 487 n.20 (1957) as "material having a tendency to excite lustful thoughts."

79. *See* Jenkins v. Georgia, 418 U.S. 153 (1974) (the film "Carnal Knowledge").

80. While the distinction between sexual imagery and social ideas has been drawn by the Court, there is considerable debate over the legitimacy of such a distinction. *See* cases cited at note 51 *supra.*

81. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58-61 (1973).

82. 403 U.S. 15 (1971).

83. *Id.* at 26.

84. *Id.*

85. *E.g.,* Lewis v. City of New Orleans, 415 U.S. 130 (1974); Hess v. Indiana, 414 U.S. 105 (1973); Papish v. University of Mo., 410 U.S. 667 (1973); Gooding v. Wilson, 405 U.S. 518 (1972).

B. *The First Amendment in the Broadcast Context*

1. *Access to the Media*

The broadcast context adds two unique considerations to the issue of content-based regulation of indecent speech. The first consideration concerns access to the media. In framing its consideration of the societal interests involved in *Pacifica*, the Court alluded to the "special meaning" of the first amendment in the broadcast context as developed by *Red Lion Broadcasting Co. v. FCC* and its progeny.[86] *Red Lion* presented a challenge to two different aspects of the FCC's fairness doctrine regulations. The first regulation required that any individual who was the subject of personal attack over the broadcast medium be given a tape, manuscript, or summary of the broadcast and be offered reply time.[87] The second regulation required broadcasters to allow time for reply to political editorials.[88] In affirming the FCC's regulations the Court held,

> In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of these unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling of issue here are both authorized by statute and constitutional.[89]

Red Lion, therefore, stands for the proposition that governmental interference into the broadcast media for the purpose of guaranteeing minority access to the media for the presentation of minority ideas is justified.[90]

2. *FCC Influence on Regulation*

The second consideration goes to the role of the FCC in indecent speech regulation. The FCC is charged with broad powers with which to regulate the broadcast industry,[91] not the least of which is the power to make licensing determinations.[92] While licensing determinations are

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86. 395 U.S. 367 (1969); *See, e.g.*, FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978); Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

87. 395 U.S. at 372.

88. *Id.* at 374.

89. *Id.* at 400.

90. *Cf.* Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), which presented a challenge to the refusal of a broadcast licensee to sell broadcasting time to the Democratic National Committee and to the Business Executives' Move for Vietnam Peace. The issue whether the action of the broadcasting licensee constituted "government action" for first amendment purposes was not definitely answered by a majority of the Court. Nevertheless, in holding in favor of the broadcast licensee the majority expressed fear that the Court would risk an enlarged control over the content of public broadcasts by the government if it held otherwise. *Id.* at 126-27.

91. *E.g.*, 47 U.S.C. § (1970) (section 303(g) is quoted in note 21 *supra*).

92. Much of the FCC's power over broadcasters is derived from the licensing process. All radio broadcasters are required to be licensed by the FCC [47 U.S.C. § 301 (1970)] and licenses must be renewed every three years [47 U.S.C. § 307(d) (1970)]. Moreover, the FCC discretionary powers over licensing have become broad through both legislative fiat and judicial gloss. In brief, these powers

subject to judicial review,[93] it may be difficult for a disappointed broadcaster to prevail in court because of the inherent vagueness of the licensing standards.[94] Therefore, both the range of powers of the Commission and the attitude of the FCC toward indecent speech have a significant practical impact on the tenor of indecent speech regulation. Several examples will serve to illustrate the historical attitude of the FCC toward indecent speech[95] and the types of materials previously considered by the FCC.

In 1964 the Commission considered applications for license renewals for several stations owned by the Pacifica Foundation[96] in light of several complaints to the Commission about the airing of five "provocative" programs over a four-year period. Four of the programs were broadcasts of contemporary American literary material—poems of Lawrence Ferlinghetti and others, a play, and part of a novel—read by the respective authors. The four programs contained "a few offensive words"[97] and "certain minor swear words."[98] The fifth program hosted eight homosexuals who discussed their attitudes and problems. The license renewals were granted, but subsequently limited to one year's duration rather than the normal three, for the failure of Pacifica "to conform to its stated supervisory policies."[99] Consideration of the station's supervisory powers was in this case determinative of whether the station was operating in the "public interest."[100]

In *Jack Frost Memorial Foundation*[101] the Commission was faced with complaints of the alleged use of "profane, indecent or obscene language"[102] by KRAB-FM. The FCC initially determined that the station's license should only be renewed for one year, although the FCC

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require the FCC to make licensing determinations in pursuance of the "public interest, convenience, and necessity," 47 U.S.C. § 309 (1970), criteria that are "as concrete as the complicated factors for judgment in such a field of delegated authority permit," National Broadcasting Co. v. United States, 319 U.S. 190, 215-16 (1943), for the purpose of providing "a fair, efficient and equitable distribution of radio service [to the several states and communities]," 47 U.S.C. § 307(b) (1970). *See* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978).

93. 47 U.S.C. § 402 (1970).

94. *See* authorities cited at note 107 *infra; see generally* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978); National Broadcasting Co. v. FCC, 319 U.S. 190 (1943).

95. *See also* Sonderling Corp., 27 P. & F. RADIO REG. 2d 285, *reconsideration denied*, 41 F.C.C.2d 777 (1973), *aff'd sub nom.* Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975); Palmetto Broadcasting Co., 33 F.C.C. 250 (1962), *reconsideration denied*, 34 F.C.C. 101 (1963), *aff'd on other grounds sub nom.* Robinson v. FCC, 334 F.2d 534 (1964), *cert. denied*, 379 U.S. 843 (1964); Mile High Stations Inc., 28 F.C.C. 795 (1960).

96. Pacifica Foundation, 1 P. & F. RADIO REG. 2d 747 (1964).

97.. *Id.* at 751.

98. *Id.* at 750.

99. Pacifica Foundation, 6 P. & F. RADIO REG. 2d 570, 571 (1965).

100. *See* note 92 *supra.*

101. 21 F.C.C.2d 833 (1970), *hearing ordered on reconsideration*, 24 F.C.C.2d 266 (1970), *hearing on motion to clarify and enlarge issues*, 26 F.C.C.2d 97 (1970), *license renewed*, 29 F.C.C.2d 334 (1971).

102. 21 F.C.C.2d at 833.

never saw a transcript of the controversial broadcasts and had no information about the context of the speech used.[103] The Commission reasoned that it need not apply the indecency statute[104] to the offending language, but had only to address the failure of the station to follow its stated policies. Subsequently, motions for rehearing and enlargement of the issues were granted[105] in which the station had the burden of proving that its overall programming was in the "public interest" and that it was entitled to a full three-year license renewal.[106] Although the station ultimately prevailed, this case not only illustrates the ease with which the indecent language issue was circumvented, but also demonstrates the potential *in terrorem* effect that the Commission's procedures may have on broadcasters generally.[107]

The much-discussed case of *Eastern Educational Radio*[108] concerned an hour-long tape recorded interview with Jerry Garcia, a member of the "Grateful Dead," a rock and roll music group. Garcia discussed his views on various social issues, interjecting what the commission termed "gratuitous"[109] four letter words.[110] The interview was essentially an expression of the views of the counterculture of the Vietnam era. In imposing a one hundred dollar forfeiture on the station the Commission maintained that it had "a duty to act to prevent the widespread use on broadcast outlets of such expressions . . . ."[111] and that the use of indecent language [could] be avoided on radio with stifling in the slightest any thought which the person wish[ed] to convey."[112] The Commission's test of indecency was adapted from the then current obscenity standard of *Roth-Memoirs*.[113] The Commission found that "the

103. *Id.* at 834.

104. 18 U.S.C. § 1464 (1976). The text is set out in note 21 *supra*.

105. *See* note 101 *supra*.

106. 26 F.C.C.2d at 99.

107. Chief Judge Bazelon of the United States Court of Appeals for the District of Columbia Circuit has dubbed the experience of KRAB-FM as " 'raised eyebrow' harassment." Illinois Citizen's Comm. for Broadcasting v. FCC, 515 F.2d 397, 417 n.41 (D.C. Cir. 1974) ("statement of Judge Bazelon as to why he voted to grant rehearing *en banc*"). To ensure compliance with its programming policies the Commission relies on the initial licensing and licensing renewal process. *See* note 92 *supra*. To produce desired programming changes the Commission may rely on such procedures as scheduling a hearing for license renewal instead of renewing a license pro forma. Alternatively, the Commission might send a letter of inquiry to the station or make a telephone call to the station owner or his attorney. The role of the FCC in the area of program content control has been questioned by several commentators on first amendment grounds. Their discussions serve to highlight the informal procedures by which the FCC exerts pressure on licensees without having to rely on formal mechanisms. Kalvin, *supra* note 21, at 21; Robinson, *supra* note 21, at 121-27; Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701, 703 (1964).

108. 24 F.C.C.2d 408 (1970).

109. *Id.* at 413.

110. Garcia's comments included such statements as, "Political change is so fucking slow." *Id.* at 409.

111. *Id.* at 410.

112. *Id.*

113. In *Roth* the Court asked "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient

speech involved [had] no redeeming social value, and 'was' patently offensive by contemporary community standards, with very serious consequences to the 'public interest in the larger and more effective use of radio' (section 303 (g))."[114] This case provided the major framework for the consideration of the Carlin monologue.

In sum, the FCC has historically taken a strong stance against the use of indecent speech in broadcast. At times the FCC has exhibited an overzealous attitude that has resulted in a compromise of first amendment values.[115]

The FCC's position on derogatory racial and ethnic speech demonstrates a marked contrast in attitude. *United Federation of Teachers*[116] concerned the airing of an antisemitic poem[117] on a program investigating racism and the relations between "Negroes and Jews."[118] The poem was read to expose the listeners to "this element of opinion in the black community."[119] The FCC's consideration of this matter can be summarized as follows:

> We recognize that media critics and others have asserted that while it is desirable for broadcasters to focus on the problem, there is no need to do so by permitting "sensational" statements such as here involved. . . . While there may well be substance to such criticism this is not a matter appropriate for this agency.[120]

Similarly, in *Julian Bond*[121] the FCC determined that it could not prohibit the use of the word "nigger" by a political candidate in his announcements over a broadcast station.[122] The FCC has shown great concern over the use

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interest." Roth v. United States, 354 U.S. 476, 489 (1957). In *Memoirs* the Court added,

> Under this definition . . . three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).

114. 24 F.C.C.2d at 410.

115. *See* F.C.C. v. Pacifica Foundation, 556 F.2d 9, 21 (1977) (Bazelon, J., concurring), *rev'd*, 98 S. Ct. 3026 (1978). "Several years ago, I felt compelled to write that 'the FCC has demonstrated what one can most charitably describe as a total ignorance of the constitutional definition of obscenity.' . . . Unfortunately, this case would seem to confirm that view."

116. 17 F.C.C.2d 204 (1969).

117. The poem began,

> Hey, Jewboy, with that yamulka on your head
> you pale faced Jewboy—I wish you were dead
> I can see you Jewboy—no you can't hide
> I got a scoop on you—yea, you gonna die . . . .

Id. at 204-05.

118. *Id.* at 206.

119. *Id.* at 205.

120. *Id.* at 209.

121. 43 P. & F. RADIO REG. 2d. 1015 (1978).

122. *Id.* at 1015. *See also* Anti-Defamation League of B'nai B'rith v. FCC, 403 F.2d 169 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969).

of sex-based speech but little concern for the use of racial or ethnic speech.

The foregoing discussion has identified two central aspects of regulation of indecent speech in the broadcast context: *justification* and *scope* of regulation. The concepts of value and harm form the theoretical framework used to justify the regulation of indecent speech; the scope of that regulation is closely tied to the broad statutory powers of the FCC.

III. ANALYSIS OF *Pacifica*

A. *The Value of Indecent Speech*

Justice Stevens, in the plurality portion of his opinion, indicated that regulation of indecent speech will affect only the form rather than the content of the message communicated and that such speech has comparatively less value than other forms of communication.[123] Justice Stevens recognized, however, that in some contexts the use of indecent speech must be protected.[124] This "sliding scale" approach to the first amendment traces its origin to the plurality opinion of Justice Stevens in *Young v. American Mini Theatres.*[125] This approach uses the following analytical process. To decide whether particular speech will be protected, an initial inquiry is made to determine if that speech falls into a general category of speech that has less value. If the speech in question is within a less valuable category, a second inquiry is made to determine the value of the speech with reference to the particular context in which the speech is used.[126]

Justice Stevens characterized indecent speech ("patently offensive words dealing with sex and excretion")[127] by noting that "such utterances are no essential part of any exposition of ideas" and "ordinarily lack literary, political or scientific value."[128] If this characterization is accurate, then why should such speech be protected in *any* context? Under obscenity analysis, if speech appeals only to the prurient interest and does not constitute a serious attempt to communicate social ideas it is unprotected in *all* contexts.[129]

By acknowledging the vitality of indecent speech in some contexts

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123. FCC v. Pacifica Foundation, 98 S. Ct. at 3039.

124. *Id.*

125. 427 U.S. 50 (1976); *see* note 72 *supra.*

126. FCC v. Pacifica foundation, 98 S. Ct. at 3037-39.

127. *Id.* at 3038.

128. *Id.* at 3039.

129. In Roth v. United States, 354 U.S. 476, 484 (1957), Justice Brennan, writing for the Court, explained:

> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees [of the First Amendment]. . . . But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.

In Miller v. California, 413 U.S. 15 (1973) the Court reaffirmed the notion that obscenity is unprotected

Justice Stevens implicitly recognized the inseverable link of indecent speech to the communication of ideas. How then may it be said that indecent speech in the abstract is of little value? To force Carlin to broadcast his message, that societal attitudes toward these forbidden words are "essentially silly," without using the words themselves, is to disregard the "emotive function"[130] of that message. The transcript of the Carlin monologue found in the appendix to the case[131] illustrates that at numerous points the monologue was interrupted by audience laughter, a clear indication that Carlin had communicated his message. For the comedian Carlin, the precise composition of his monologue was undoubtedly part and parcel of the ideological message conveyed.

The risk of suppressing indecent speech has been aptly summarized by one commentator:

> This new view of the protection due offensive language is of special importance to dissident groups in American society. Offensive words are most often used in public by members of groups whose divergence from the traditional American life style includes social, political, philosophical, cultural, and linguistic differences. It is not coincidental that the litigants in *Cohen, Gooding, Rosenfield, Lewis, Brown,* and *Papish* were all members of such groups. To allow enforcing authorities who are often the object of this offensive language to suppress it simply because partisans of the dominant life style find it distasteful is to censor the vital ideological and emotional content of dissidents' expression.[132]

To the extent that Carlin's method and message do not comport with mainstream American notions, his expression may properly be considered dissident. Justice Stevens implicitly acknowledged the value of Carlin's speech by recognizing that the Carlin monologue would be protected speech in some contexts.[133] Therefore, to say that the speech used in the Carlin monologue is less valuable than some other *expression* is to say a fortiori that Carlin's message is less valuable than some other *message*.[134] At the very heart of the first amendment is the right of the individual to determine the value of ideological expression; the state is precluded from

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speech. The *Miller* Court, however, amended the element of the obscenity test that required a finding of "utterly without redeeming social importance" to a determination of whether the work taken as a whole lacks serious literary, artistic, political or scientific value." *Id.* at 24. *See also* text accompanying note 78 *supra.*

130. *See* text accompanying note 83 *supra.*

131. 98 S. Ct. at 3041.

132. Rutzick, *Offensive Language and the Evaluation of First Amendment Protection,* 9 HARV. C.R.-C.L. L. REV. 1, 28 (1974); *See* Haiman, *Speech v. Privacy: Is There a Right Not to Be Spoken to?,* 67 NW. U.L. REV. 153, 191-92 (1972).

133. 98 S. Ct. at 3039.

134. *See* Cohen v. California, 403 U.S. 15 (1971), discussed in text accompanying notes 82-85 *supra.* "[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." *Id.* at 26; Haiman, *supra* note 132, at 189: "For example, it can hardly be maintained that phrases like, 'Repeal the Draft,' 'Resist the Draft,' or 'The Draft Must Go' convey essentially the same message as 'Fuck the Draft.' Clearly something is lost in the translation."

making such determinations.[135] Under Justice Stevens' approach an orthodoxy of particular ideas is being prescribed.

The second aspect of Justice Stevens' approach also creates confusion. After it is assumed that indecent speech generally is less valuable, the context of the speech is examined to determine the value of the speech in that context and therefore to assess whether the speech deserves protection.[136] Justice Stevens assumed arguendo that the Carlin monologue is protected in other contexts.[137] By implication, in the broadcast context the value of Carlin's monologue is diminished. How can it be said that Carlin's message is less *valuable* when aired on a program discussing societal attitudes toward language than when aired in the concert hall or in record form? Could it be said that Cohen's clearly political message, in *Cohen v. California*,[138] would have had less *value* had it been aired over radio rather than displayed on the back of his jacket? The decisive factor in these cases is the potential *harm* of the speech, not the *value* of the speech in a particular context. The *value* of the speech is necessarily a subjective determination that may change with the length of the Justices' feet. The proof of this subjectivity is found in the test of value offered by Justice Stevens—"vulgar, offensive, and shocking."[139] The important question is, vulgar, offensive, and shocking *to whom?* Even Justice Stevens candidly admitted that "the fact society may find speech offensive is not a sufficient reason for suppressing it."[140] The concept of value therefore adds more confusion than clarity to the analysis of indecent speech because of its elusive nature.

The difficulties of making value determinations have been aptly demonstrated by the Court's obscenity decisions. Indeed, Justice Stewart's frustrated "I know it when I see it"[141] approach was a manifestation of these difficulties. Under the Court's obscenity approach the distinctions that must be drawn are simpler than the distinctions found in Justice Stevens' indecent speech approach. In obscenity adjudication the Court must essentially decide whether a work has diminished value or not.[142]

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135. *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

136. 98 S. Ct. at 3039.

137. *Id.*

138. 403 U.S. 15 (1971). *See* text accompanying notes 82-85 *supra.*

139. 98 S. Ct. at 3039.

140. *Id.* at 3038.

141. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

142. *See* text accompanying notes 76-79 *supra; cf.* Ginsberg v. New York, 390 U.S. 629 (1968) and Mishkin v. New York, 383 U.S. 502 (1966) and Ginzburg v. United States, 383 U.S. 463 (1966) (Obscenity determinations are not always made by assessing the value of the material in the abstract. The context in which the material is found may influence the finding of obscenity if the material is sold to minors, appeals to sexual deviants, or is pandered.). *But cf.* Splawn v. California, 431 U.S. 595, 603 n.2 (1977) (Stevens, J., dissenting) (Justice Stevens would have overruled *Ginzburg* in light of *Virginia Pharmacy Board* because of the social significance of the free flow of truthful information. Had Justice

Under Justice Stevens' approach the Court is faced with distinguishing between the value of speech in different contexts.

Although this "sliding scale" value approach of Justice Stevens represents only the views of three Justices in *Pacifica,*[143] its importance should not be underestimated. A full majority of the Court has accepted this approach in the context of commercial speech. In that context the approach appears vulnerable to the same criticisms as in indecent speech. The Court in *Ohralik* characterized commercial speech as having a "subordinate position in the scale of First Amendment values."[144] Yet the Court's opinion was aimed at demonstrating the potential harm of in-person solicitation of clients by an attorney for pecuniary gain. In contrast, the Court's decision in *Primus,*[145] a companion case to *Ohralik*, avoided the mention of the "subordinate value" of commercial speech. In *Primus* the Court characterized the solicitation by letter of a client by an ACLU lawyer as "political expression and association"[146] rather than commercial speech, to avoid the potential effects of the "subordinate value" proposition. While *Ohralik* and *Primus* may be distinguished because of the potential pecuniary gain of the attorney in *Ohralik,* such a distinction is not a reliable basis for distinguishing between the *value* of the speech in *Ohralik* and the *value* of the speech in *Primus.* Indeed, the solicitation in *Ohralik* is potentially as valuable as the solicitation in *Primus* if such solicitation promotes the free flow of truthful information.[147] Therefore, the "sliding scale" value approach to the first amendment as applied to commercial speech produces several unfortunate consequences. First, it leads to difficult distinctions based on "the motive of the speaker and the character of the expressive activity."[148] Second, it creates an exception to the principle that the value of speech "is a judgment for each person to make, not one for the judge to impose upon him."[149] Last, this approach serves to obfuscate the central basis for distinguishing between cases. That central basis is the potential *harm* of speech in a particular context. Thus, the results in *Ohralik* and *Primus* can be easily reconciled by focusing on the "particularly strong"[150] state interests threatened by *Ohralik* that remained unthreatened in *Primus.*

Similarly, what appears to be at the heart of Justice Stevens' opinion

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Stevens' view been adopted by the Court, obscenity analysis would have been simplified by removing a significant context variable.).

143. *Id.* at 3037-39.

144. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). *See* text accompanying notes 58-75 *supra.*

145. *In re* Primus, 436 U.S. 412 (1978).

146. *Id.* at 431.

147. *See* text accompanying notes 58-75 *supra.* Virginia State Bd. of Pharmacy v. Virginia Citizens Council, 425 U.S. 748, 765 (1976); Bates v. State Bar of Ariz., 433 U.S. 350, 365 (1977).

148. *In re* Primus, 436 U.S. at 438 n.32.

149. FCC v. Pacifica Foundation, 98 S. Ct. at 3047.

150. Ohralik v. Ohio State Bar Ass'n, 436 U.S. at 460.

in *Pacifica* is the issue of the *harm* of indecent speech rather than the *value* of such speech. It was the analysis of the *harm* of the Carlin monologue as manifested by the privacy interest of adults and the interests of children that gained the acceptance of a majority of the Court.[151] In order to unravel the confusion created by these recent cases the Court must return to basic first amendment analysis. Basic first amendment analysis focuses on the *harm* of the speech and leaves subjective value determinations to the individual.[152]

Before turning to the harm implicated by the Carlin monologue in the broadcast context, it is necessary to consider one preliminary matter. That matter deals with the appropriate impact of the *Red Lion*[153] doctrine that "the first amendment has special meaning in the broadcast context."[154] Before its analysis of the societal interests at issue in *Pacifica*, the majority alluded to the "special meaning" doctrine of *Red Lion* and its progeny,[155] implying that *Red Lion* lends support to the content regulation sanctioned in *Pacifica*. The most striking difference between *Red Lion* and *Pacifica* is that in *Red Lion* the Court sanctioned governmental interference into the broadcast media for the purpose of guaranteeing minority *access* to the media.[156] *Pacifica*, by contrast, placed the government in the role of censor displacing minority views from the radio. While *Red Lion* and its progeny do indicate that the broadcast medium presents unique first amendment problems, none of the unique aspects of broadcast considered in those cases supports governmental censorship of speech integrally related to social or political thought.[157] Indeed, in *Red Lion* the Court noted, "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, *whether it be by government itself* or a private licensee."[158] The principles of *Red Lion* should not, therefore, be extended to content regulation that proscribes speech.

The interjection of the "sliding scale" value approach and the "special meaning" doctrine serve only to cloud the crucial issue in *Pacifica*. That issue, the potential harm of indecent speech in the broadcast context,

151. 98 S. Ct. at 3043 (Powell, J., concurring).

152. *See* cases cited at note 135 *supra*.

153. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-87 (1969).

154. FCC v. Pacifica Foundation, 98 S. Ct. at 3036 n.17. *See* text accompanying notes 86-90 *supra*.

155. *See* cases cited at note 86 *supra*.

156. *See* text accompanying note 89 *supra*.

157. *Cf.* Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom.* Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972) (upholding prohibition of cigarette advertising in broadcast media). This decision rested on an earlier notion, since overruled, that commercial speech was generally beyond the protection of the first amendment. *See generally* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942); *see also* Virginia State Bd. of Pharmacy v. Virginia Citizens Council, 425 U.S. 748 (1976), discussed in text accompanying notes 58-62 *supra*.

158. Red Lion Broadcasting Co. v. FCC, 395 U.S. at 390 (emphasis added).

requires consideration of the privacy interests of unwilling adult listeners and the interests of children who may be present in the broadcast audience.

B. *Social Harm*

1. *Protecting the Privacy Interest of Unwilling Adult Listeners*

The first of two social interests asserted by the Court to justify the regulation of speech in *Pacifica* was the right of unwilling adult listeners to privacy in their homes.[159] The interest in the home, the Court maintained, was implicated because of the "uniquely pervasive presence [of the broadcast media] in the lives of all Americans."[160] Faced with the argument that the privacy interests of unwilling adults were insignificant because of the ease with which offended listeners might either have changed the dial or refrained from tuning into the program in the first instance,[161] the court responded:

> To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid the harm that has already taken place.[162]

To demonstrate the weight of the privacy interests in the home compared to the first amendment rights of an "intruder" the Court cited *Rowan v. United States Post Office Department.*[163] *Rowan*, however, left the choice of censorship to the individual addressee. The Court clearly distinguished the case of a governmental official determining the propriety of sending different types of material through the mail.[164] The Court had considered similar matters in *Hannegan v. Esquire, Inc.*[165] In *Hannegan* the Court prohibited the use of the postal power by the Postmaster General to regulate the mailing of material that was not fraudulent or obscene.[166] In these cases the acceptance or rejection of the material was left to the discretion of the individual.

Of particular interest in assessing the privacy interest of unwilling adult listeners is *Erznoznik v. City of Jacksonville.*[167] In *Erznoznik*, an ordinance that prohibited drive-in movie theaters from exhibiting films

159. FCC v. Pacifica Foundation, 98 S. Ct. at 3040.

160. *Id.*

161. *Id.* at 3048-49 (Brennan, J., dissenting).

162. *Id.* at 3040.

163. 397 U.S. 728 (1970). The case presented a challenge by the operators of mail order houses to the constitutionality of a federal postal statute under which a householder could require that his name be removed from mailing lists and that all future mailings to him be halted. *Id.* at 729.

164. *Id.* at 737.

165. 327 U.S. 146 (1946).

166. *Id.* at 155-56.

167. 422 U.S. 205 (1975).

containing nudity if the movie screen was visible from a public street was held to be illegal content-based discrimination because the ordinance did not cover other types of potentially offensive subjects as well. In defense of the ordinance, the city raised the issue of the privacy interest of unwilling adults. The Court, through Justice Powell, rejected this justification for the ordinance, noting that absent a clear invasion of privacy in the home or circumstances making it impractical for an offended viewer to avoid exposure, the offended viewer must avert his eyes.[168] It may be argued that *Erznoznik* and *Pacifica* are distinguishable because the former dealt with an offense to the sensibilities of the viewer in a public place whereas the latter implicated privacy in the home. This is a distinction without a difference. Radio broadcasts do not invade the privacy of the home. Indeed, the potential listener invites the "public" into his home by voluntarily turning on the radio. Moreover, the offended listener is better able to protect his sensibilities than the unwilling viewer in the public street. In *Erznoznik*, as in *Cohen*,[169] the offended viewer was relegated to the remedies of averting his eyes or leaving the scene. The offended broadcast listener suffers no such inconvenience or discomfort. He may simply turn off the radio program and be done with it. As Justice Brennan in his dissenting opinion in *Pacifica* aptly stated:

> Even if an individual who voluntarily opens his home to radio communications retains privacy interests of such moment to justify a ban on protected speech if those interests are "invaded in an essentially intolerable manner," the very fact that those interests are threatened only by a radio broadcast precludes any intolerable invasion of privacy; for unlike other intrusive modes of communication, such as sound trucks,"[t]he radio can be turned off," —and with a minimum of effort.[170]

By allowing a governmental agency to determine that nonobscene speech may constitutionally be kept from the entire listening public, willing and unwilling alike, in order to protect unwilling listeners, the *Pacifica* Court has extended the privacy interest beyond the bounds previously recognized. It is not clear that the Court has considered the plethora of implications arising from this decision.

An issue of immediate significance is the potential treatment of derogatory racial and ethnic speech in the broadcast context. The issue has been raised[171] and clearly must be resolved by the Court in light of its decision in *Pacifica*. Certainly a cogent argument can be made that derogatory racial and ethnic terms are as harmful, offensive, and intrusive in the broadcast context as the sexual and excretory terms of the Carlin monologue, perhaps more so. Moreover, it is clear that no logical distinction can be drawn between derogatory racial and ethnic terms and

168. *Id.* at 212.

169. 403 U.S. 15, 21 (1971).

170. 98 S. Ct. at 3049 (citations omitted).

171. *See* text accompanying notes 116-22 *supra*.

indecent speech. Does it not, therefore, seem curious that the FCC has been reluctant to promulgate regulations to restrict the use of derogatory racial and ethnic terms?[172] The anomaly of the Commission's position is explained by the very same considerations developed earlier. The Commission's decision not to regulate the use of derogatory ethnic and racial terms can only be viewed as a subjective determination based on its members' perception of the *value* of racial and ethnic speech. Undoubtedly, the FCC perceives ethnic and racial speech to be more closely tied than indecent speech to political ideas. Surely *Cohen v. California*[173] and the interpretation of the Carlin monologue demonstrated earlier[174] illustrate the fallacy of the Commission's view. Moreover, banning derogatory racial and ethnic terms will not cure the inconsistencies inherent in the Commission's position, for then the FCC and the Court must face yet other categories of speech deemed to be offensive and intrusive by some individuals. Some individuals are deeply offended by certain religious programming, others by the idiocy of certain media advertisements. By banning any type of speech related to the communication of social ideas the FCC and the Court are necessarily placing the interests of one segment of the population above the interests of another.[175] The regulation of this expanding group of categories of speech must necessarily result in either the relegation of the listening public to the uniformly inoffensive and bland or continued differentiation based on the subjective inclinations of the regulating body. Both results clearly deprive the broadcast industry of first amendment protection.[176] What has been implicitly demonstrated by the foregoing analysis is that the harm of indecent speech to the offended adult listener is no greater than that which various segments of the listening public currently must endure.

It should not be inferred from the foregoing discussion that the *Pacifica* Court completely foreclosed radio broadcast of indecent speech; the Court stressed that its holding was narrow.[177] Nevertheless, difficulties persist. The categories of regulated speech cannot be narrowly cir-

172. *Id.*

173. 403 U.S. 15 (1971). *See* text accompanying notes 82-85 *supra.*

174. *See* FCC v. Pacifica Foundation, 98 S. Ct. at 3048 (Brennan, J., dissenting); Eastern Educ. Radio, 24 F.C.C.2d 408 (1970), discussed in text accompanying notes 108-14 *supra;* text accompanying notes 132-42 *supra.*

175. *See* Haiman, *supra* note 132, at 191-92.

> Deference is being paid to the sensibilities and privacy claims of the prevalent groups in society who happen to find . . . certain kinds of words deeply repulsive, while no comparable concern is shown for minorities who may have no "hang-ups" about *those* particular kinds of communication, but who may be just as deeply offended by different verbal and visual stimuli which few would seriously propose to exclude . . . .

176. *See* FCC v. Pacifica Foundation, 98 S. Ct. at 3048-49 (Brennan J., dissenting); Terminiello v. Chicago, 337 U.S. 1, 4 (1949): "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *See also* cases cited at note 135 *supra.*

177. FCC v. Pacifica Foundation, 98 S. Ct. at 3040-41 n.28.

cumscribed. Moreover, the privacy interest that the Court used to justify limited regulation in *Pacifica* logically extends the scope of regulation beyond the narrow bounds approved by the Court.[178]

By analogizing the interests of unwilling adult listeners in *Pacifica* to the interests of those subjected to "indecent phone call[s]" and "assault[s]"[179] the Court implicitly suggested that its concern was aimed at the initial shock suffered by offended listeners, the shock that occurs in the brief interval between the time the words are first heard and the time the dial is changed. Prior warnings do not sufficiently protect offended listeners, the Court maintained, because "the broadcast audience is constantly tuning in and out."[180] If the privacy interest, as manifested by the prevention of initial shock, is the interest that the Court sought to protect, it is unclear how the "host of variables," such as "the time of day" or the "context of the program in which the language is used,"[181] may be used to limit effectively the scope of regulation of indecent speech in the broadcast context. How can the privacy interest of the offended adult listener who tunes in at 2:00 p.m. be distinguished from the privacy interest of the offended adult listener who tunes in at 1:00 a.m.? When only a few words may offend in the seconds required to change the dial, what difference does it make to the offended listener whether the offensive words are the only such words in the entire program or merely a small sample of what is yet to come? In sum, recognition of the privacy interest of unwilling adult listeners leaves both the selection of the categories of speech subject to regulation and the scope of regulation to the subjective inclinations of the regulating body.

2. *The Presence of Children in the Listening Audience*

The critical question in *Pacifica*, the "bottom line," is the social interest in protecting children from the adverse effects of indecent speech. It was this interest that was of primary concern to the FCC when it instituted its action against Pacifica Foundation[182] and it was this interest that was obscured by the discussion of the intrinsic value of indecent speech,[183] and the special meaning of the first amendment in the broadcast context,[184] and the interest of adults in the privacy of the home.[185] The majority maintained that regulation of indecent speech in the broadcast context was justified because the material was uniquely accessible to

178. *Id.* at 3041, quoted in text accompanying note 48 *supra.*

179. *Id.* at 3040, quoted in text accompanying note 162 *supra.*

180. *Id.*

181. *Id.* at 3041.

182. FCC v. Pacifica Foundation, 59 F.C.C.2d 892, 892 (1976), *rev'd*, 556 F.2d 9 (1977), *rev'd*, 98 S. Ct. 3026 (1978).

183. *See* text accompanying notes 123-52 *supra.*

184. *See* text accompanying notes 153-58 *supra.*

185. *See* text accompanying notes 159-81 *supra.*

children, that is, the dissemination of indecent programming to willing adult listeners could not be accomplished without affecting the interests of children because unsupervised children are able to tune in to indecent programming.[186] The unique accessibility of the broadcast media to children is irrelevant, however, if the *harm* to children is insufficient to justify the regulation of speech. The legitimate right of the state "to adopt more stringent controls on communicative material" in order to protect children is firmly established.[187] The potential harm to children in this case, however, is not serious enough to justify the pervasive regulation[188] of indecent speech that will necessarily flow from the Court's decision. Both Justice Stevens and Justice Powell acknowledged the existence of harm to children but neither clearly articulated its dimensions. Justice Stevens noted that "Pacifica's broadcast could have enlarged a child's vocabulary in an instant."[189] Justice Powell maintained "that such speech may have a deeper and more lasting negative effect on a child than an adult," and "[t]he language involved in this case [was] as potentially degrading and harmful to children as representations of many erotic acts."[190] The problem with these assertions is that they appear in the case as mere conclusions, unsupported by citation to scientific or other authority. Therefore, while the essence of the Court's decision rested on a determination that serious harm sufficient to outweigh first amendment considerations existed, no indication was given regarding the basis for that determination.

Juxtaposed against the Court's conclusion are two indicators that raise serious doubts about the validity of that conclusion. *Cohen v. California*[191] stands in bold relief. In the report of the facts of *Cohen* it was noted that "women and children" were present in the corridor of the Los Angeles County Courthouse when Cohen exposed the message on his jacket.[192] Yet no mention of this fact is found in the *Cohen* majority opinion. It is difficult to understand how an interest of such strong proportions in *Pacifica* warranted not a single reference in *Cohen*. Recalling that Justice Stevens implicitly recognized the continuing vitality of cases like *Cohen*[193] it is unclear why the interests of "women and children" in *Cohen* are less pressing than the interests of the children in *Pacifica*. The various academic studies cited by Justice Brennan in his dissent also tend to undermine the majority's conclusion. These studies

186. 98 S. Ct. at 3045 (Powell, J., concurring).

187. Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975); *see* cases cited in FCC v. Pacifica Foundation, 98 S. Ct. at 3044.

188. *See* text accompanying notes 198-207 *infra*.

189. 98 S. Ct. at 3040.

190. *Id.* at 3045.

191. 403 U.S. 15 (1971).

192. *Id.* at 16.

193. 98 S. Ct. at 3039.

show that in certain subcultures of our society, not only are such words as Carlin used in his monologue considered inoffensive, but they may be "the stuff of everyday conversations."[194] The proof that children are adversely affected by indecent speech is, therefore, less than conclusive.

In this light, the Court's opinion must be seen as prescribing an orthodoxy of particular ideas for children. Not only does such a prescription violate the right of parents to raise their children as they see fit,[195] but it violates the substantial first amendment rights of children as well. In this latter respect the Court's opinion in *Pacifica* runs counter to *Erznoznik*[196] in which the Court recognized that

> speech that is neither obscene as to youths or subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.[197]

The protection of children does not appear to necessitate the pervasive regulation of speech implicitly approved by the Court in *Pacifica.*

IV. FUTURE IMPLICATIONS OF *Pacifica*

A. *Chilling Effect*

One of the major constitutional issues raised by Pacifica Foundation was overbreadth. Pacifica claimed and the court of appeals agreed that the Commission's indecency standard was "massively overbroad."[198] Both Justice Stevens and Justice Powell circumvented the consideration of overbreadth by reading the FCC order narrowly as an ad hoc determination "issued in a specific factual context."[199]

While the Court may have avoided the overbreadth argument, a grave potential for pervasive regulation and the chilling of protected speech nonetheless exists. This potential arises from several sources. First, and of foremost concern, is the Commission's strong tendency to overregulate the use of indecent speech.[200] The restrictive test developed by the FCC in *Pacifica* under which the number of children in the listening audience is "reduced to a minimum"[201] aptly demonstrates the Commission's attitude. Indeed, two of the Commissioners would have banned the use of indecent

194. *Id.* at 3054.

195. 98 S. Ct. at 3051 (Brennan, J., dissenting) (citations omitted).

196. 422 U.S. 205 (1975); *see* text accompanying note 166 *supra.*

197. *Id.* at 213-14 (footnotes omitted).

198. 556 F.2d 9, 21 (1977) (Bazelon, J., concurring), *rev'd,* 98 S. Ct. 3026 (1978).

199. 98 S. Ct. at 3037. *See* text accompanying notes 35-38 *supra.*

200. *See* text accompanying notes 96-115 *supra.*

201. 56 F.C.C.2d 94, 98 (1975), *clarified,* 59 F.C.C.2d 892 (1976), *rev'd,* 556 F.2d 9 (1977), *rev'd,* 98 S. Ct. 3026 (1978). *See* text accompanying notes 8-13 *supra.*

speech from the radio under all circumstances.[202] Even the Commission's legislative proposals that Justice Powell apparently considered to be evidence of FCC "caution" in the area[203] exhibit a vigorous tendency toward regulation without clearly defined bounds of protected use of indecent speech.[204] The second source is the ability of the FCC to carry out its aims notwithstanding the potential for appellate court review. Its broad delegated power to regulate in the "public interest" gives the FCC great discretion, particularly in the area of licensing determinations.[205] While a broadcaster might eventually prevail in court, the cost of enduring "raised eyebrow harassment,"[206] a continuous threat because of the license renewal process, creates a strong incentive to stay on the Commission's "good side."

In light of these realities, the failure of the Court to establish principled limits on the Commission's power must be seen as an implicit approval of pervasive regulation of indecent speech in the broadcast context. Certainly, protection of the privacy interest of unwilling adult listeners, as recognized by the Court in *Pacifica*, necessitates pervasive regulation and therefore lends support to this view.[207]

The Commission is motivated in large part by a fear that without its strict supervision the use of indecent language over the radio will become rampant.[208] Even if widespread use of indecent language over the radio is socially undesirable there is no reason to fear that without FCC control such a result would be forthcoming. In a very real sense the marketplace recognized by Justice Holmes[209] appears to be competent to evaluate

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202. 56 F.C.C.2d at 102-03. Discussed in text accompanying note 12 *supra.*

203. 98 S. Ct. at 3047 n.4.

204. 122 CONG. REC. S17,101 (daily ed. Sept. 29, 1976) (FCC legislative proposals and comments). The FCC demonstrated its attitude toward indecent speech in the following manner: "The Commission acknowledges that this is an area of considerable legal uncertainty. However, it has a strong interest in controlling morally offensive material which is less than obscene and believes that it is compelled to act in this area despite the uncertainties." *Id.* at S17,106. In its recommendations the Commission contemplated that protecting unwilling adult listeners and children under the age of 12 requires broadcasters to avoid "sensational techniques" and requires broadcasting of programs containing indecent language to be restricted to the hours between 11 p.m. and 7 a.m. "weekdays." *Id.* at S17,106 nn. 120-21. The FCC in redefining the indecency standard concluded that " 'indecent material' means a representation or verbal description of a human sexual or excretory organ or function, which under contemporary community standards for radio communication or cable television is patently offensive." *Id.* at S17,101. The explanation of this definition highlighted its ambiguities:

> This standard is based upon the premise that these media are distinctive and therefore that a number of factors should be considered in making these judgments: The means of the communication employed, the nature and composition of the audience reached, the time of dissemination, and the length and frequency of the objectionable material. The proposed definition leaves to the Courts the question of whether this consideration should be based on local, or state or national standards and how and by whom it should be applied.

Id. at S17,106 (footnote omitted).

205. *See* note 92 *supra.*

206. *See* note 107 *supra.*

207. *See* text accompanying notes 177-81 *supra.*

208. *See* text accompanying notes 111 & 204 *supra.*

209. *See* cases cited at note 135 *supra.*

indecent speech. There is a significant economic disincentive that would limit widespread use of indecent speech over the radio. If people are offended by such language they will undoubtedly refrain from listening to stations that broadcast such language or will change the dial. Advertisers who are concerned with the widest public exposure for their advertising will be less likely to sponsor programs that suffer from a reduction in the number of listeners or enrage the public. Similarly, educational or philanthropic organizations are less likely to want their names associated with programming that evokes public ire.[210] The market, therefore, would appear to be competent to check programming abuses.

By tacitly approving pervasive regulation of indecent speech in the broadcast context, the Court has "violate[d] in spades the principle of *Butler v. Michigan*."[211] The Court has reduced the content of radio communication to that which is fit only for children, or as Justice Brennan observed, to that "which may not be constitutionally kept even from children."[212] The Court has created a grave potential for the censorship of socially valuable communication by the FCC and by broadcasters who fear FCC sanctions.

B. *An Alternative Approach*

The foregoing analysis has demonstrated the difficulties associated with determining the intrinsic value of any category of speech. Any determination based on the value of individual words used to express an idea is necessarily an evaluation of that idea. As *Cohen* and its progeny[213] illustrate, indecent speech is often used to convey a message of political protest. While the Carlin monologue was not necessarily a statement of protest, it was an opinion on societal attitudes toward language,[214] and therefore a social opinion. The decision in *Pacifica* aptly demonstrates the risk that regulation will erode the principles of the first amendment.

The regulation of indecent speech must generally be regarded as inappropriate but a narrow exception might be fashioned for programs containing indecent speech, "directed specifically at younger children."[215] According to Justice Brennan, this narrow regulation might constitute one of the "other legitimate proscriptions" alluded to in *Erznoznik*[216] because young children "are not possessed of that full capacity for individual choice which is the presupposition of the first amendment guarantees."[217]

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210. *See generally* Georgetown Univ., 66 F.C.C.2d 944 (1977).

211. 98 S. Ct. at 3050 (Brennan, J., dissenting); Butler v. Michigan, 352 U.S. 380 (1957).

212. 98 S. Ct. at 3050.

213. See notes 82 & 85 *supra*.

214. *See* text accompanying notes 3-6 *supra*.

215. 98 S. Ct. at 3050 n.3 (Brennan, J., dissenting).

216. *See* text accompanying notes 197 & 167 *supra*.

217. 98 S. Ct. at 3050 n.3 (quoting Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring)).

The harm of indecent speech outweighs the value of such speech under this approach if one hypothesizes that young children are incapable of understanding the social message that the words are meant to convey and can thus derive no value from indecent speech. While this alternative approach incorporates the concept of value, a concept that has been criticized throughout this paper,[218] the limited use of the concept in this setting is far different from the use of the concept in the approach of Justice Stevens. Under this alternative approach the concept of value is linked to a single basic assumption. This assumption, the inability of young children to perceive certain ideas regardless of the language used to express them, is well based in human experience.[219] Justice Stevens' approach requires assumptions that are far more complex. These assumptions relate to the intrinsic characteristics of certain words and the fluctuation of those characteristics that results from a change in context.[220]

This alternative approach might serve as a practical alternative to the Court's approach when considered in light of the facts of a particular case. While the approach is far more protective of free speech in theory, it may be subject to practical abuses. These abuses might result from the difficulty of determining audience composition or the age at which children begin to perceive the social significance of certain ideas. Moreover, this approach evinces only guarded confidence in the power of the marketplace.

CONCLUSION

Emerging from *Pacifica* are various difficulties that threaten the vitality of the first amendment. The most serious threat comes from Justice Stevens' application of a "sliding scale" of values to the first amendment.[221] This approach, which appears to be gaining in popularity among the members of the Court,[222] poses serious analytical problems. Under this approach, certain categories of speech are said to have less value than others; within a suspect category the value of speech fluctuates from one context to the next. This approach is subject to one major criticism, that no objective method of valuation has been offered with which to distinguish between categories and contexts. The test therefore threatens the censorship of the communication of ideas that is prohibited by the first amendment.

The threat of censorship in the broadcast context is exacerbated by the strong potential for pervasive regulation. Several factors contribute to this potential. First, the FCC desires pervasive regulation of indecent speech.[223] Second, the FCC enjoys broad discretionary powers, particular-

218. *See* text accompanying notes 123-52 *supra.*
219. 98 S. Ct. at 3050 n.3.
220. *See* text accompanying note 126 *supra.*
221. *See* text accompanying notes 123-51 *supra.*
222. *See* text accompanying notes 58-75 *supra.*
223. *See* text accompanying notes 89-95 *supra.*

ly over license renewal, that make close judicial scrutiny difficult.[224] Last, the *Pacifica* Court's decision itself contributes to potentially broad regulation. The Court implicitly encouraged pervasive regulation (1) when it subscribed to the notion that regulations were necessary to protect unwilling adult listeners from the initial shock of indecent speech;[225] and (2) when it failed to otherwise suggest minimizing regulation in this area in light of the Commission's strong inclinations.

It is hoped both the Court and the Commission will, in the future, reconsider their respective positions.

The Censor

The Censor sits
Somewhere between
The scenes to be seen
And the television sets
With his scissor purpose poised
Watching the human stuff
That will sizzle through
The magic wires
And light up
Like welding shops
The ho-hum rooms of America
And with a kindergarten
Arts and crafts concept
Of moral responsibility
Snips out
The rough talk
The unpopular opinion
Or anything with teeth
And renders
A pattern of ideas
Full of holes
A doily
For your mind[226]

Theodore Samuel Bloom

224. *See* text accompanying notes 96-97 *supra.*

225. *See* text accompanying notes 179-81 *supra.*

226. M. WILLIAMS, THE MASON WILLIAMS READING MATTER (1969), *quoted in* United Fed'n of Teachers, 17 F.C.C.2d 204, 210 (1969).